Not only is the rule as proposed by the Commission the most logical approach, it is the most practical as well. In cases where the current demarcation point is physically inaccessible, even where one moves away from the unit, the first point where the wiring becomes accessible is not necessarily the lockbox. For example, Time Warner is aware of situations where the wiring may be encased in concrete or plaster walls, then emerge in an attic or crawl space long before reaching the lockbox. Similarly, in situations where the wiring is inaccessible behind a wall, it may be easily accessible just a few feet away above a dropped ceiling panel. Thus, the Commission should adopt its proposal for dealing with physically inaccessible demarcation points in MDUs without modification. Indeed, the Commission's proposal is entirely consistent with the current rule -- by setting the MDU demarcation point "at or about" twelve inches from where the wiring enters the unit, the Commission built in a level of flexibility to allow the demarcation point to move a few inches in either direction to account for varying conditions.

VII. Sharing Of Any Excess Capacity In Hallway Moldings Or Conduit Should Be Allowed As Long As There Is Adequate Compensation Provided To An Incumbent Provider When It Owns Such Molding Or Conduit.

The Commission proposes to allow alternative MVPDs to install their wiring "within the existing molding or conduit, even over the incumbent provider's objection, when there is room in the molding or conduit and the MDU owner does not object."[55] There is broad support for such a rule where the molding or conduit is owned by the MDU owner.[56] However, where an incumbent provider owns the molding or has contracted with the MDU

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[55]Further Notice at ¶ 83.

[56]See Ameritech Comments at 6; DirecTV Comments at 15-16; GTE Comments at 15-16; RCN Comments at 9-12; SBC Comments at 6-7; MAP/CFA Comments at 20-21.

owner for the exclusive right to occupy the moldings or conduits, such a rule would constitute an unconstitutional taking of the incumbent MVPD's property, and would be outside the jurisdiction of the Commission under the Communications Act.[57] DirecTV's assertion that such a rule would not constitute a taking because the empty spaces in the molding do not belong to the owner of the molding is indefensively incorrect, and is contrary to the great weight of precedent regarding the Takings Clause of the Fifth Amendment.[58]

However, Time Warner proposes a simple solution that would promote molding and conduit sharing in such instances. Whenever there is agreement among all affected MVPDs and the MDU owner that an incumbent MVPD's hallway moldings or internal conduit can safely accommodate additional home run cables,[59] the parties should be required to negotiate in good faith regarding reasonable compensation for occupancy of such moldings or conduit. Where such compensation cannot be agreed upon, the Commission might, upon submission of an appropriate petition, determine an annual rental rate in accordance with the principles applicable to cable television occupancy of utility conduits, which not only

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[57]See Bell Atlantic Tel. Cos. v. FCC, 24 F.3d 1441, 1445-47 (D.C. Cir. 1994); Time Warner Comments at 54, 63; see also Nixon v. United States, 979 F.2d 1269, 1285-86 (D.C. Cir. 1992); Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979); Hodel v. Irving, 481 U.S. 704, 716 (1987).

[58]DirecTV Comments at 15, 16. Under DirecTV's theory, cable operators should be allowed free access to utility conduits, because any vacant space in such conduit does not really belong to the utility.

[59]RCN's suggestion that MDU owners be the sole arbiters of whether hallway molding or conduit can accommodate additional wires is entirely self-serving and must be rejected. Since an MDU owner will invariably be under contract with and receive substantial compensation from an alternative MVPD, it will likely parrot the self-interested advice of the alternative MVPD as to whether there is actually enough room in the molding to accommodate additional wires. The incumbent MVPD's input is essential because only it, not the MDU owner, can actually provide an accurate, unbiased technical analysis as to the capability of its existing molding to carry multiple wires.

accounts for the percentage of space used, but also takes into account such factors as the maintenance and administration of the molding. MAP/CFA's proposal, to provide compensation based on a percentage of the molding actually used, with reference only to the depreciated value of the molding and its installation, would fail to account for the ongoing maintenance and administration of the facilities and would undercompensate the incumbent.[60] The rule that applies to cable television occupancy of utility conduits fully provides for such factors, and more accurately reflects the cost value of the molding or conduit space.

Conversely, where it cannot be agreed that existing moldings or conduit can safely accommodate additional wires, but the MDU owner is willing to allow installation of larger moldings or conduit, the party owning the existing molding or conduit should have the option to install larger molding or conduit at the expense of the party seeking occupancy. This is the same procedure that applies when an existing utility pole is inadequate to accommodate additional attachments requested by a cable operator, and fully accounts for the costs imposed by a new provider requiring the installation of new moldings.

Finally, any party who attempts to occupy moldings or conduit without following these procedures should be subject to the immediate removal of its facilities. Such a simple rule would deter alternative MVPDs from attempting to circumvent these requirements. If the Commission adopts these procedures, Time Warner would be willing to waive the

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[60]See MAP/CFA Comments at 20-21.

provisions of any exclusive molding rights it has by contract or by law as a gesture of good faith, and to assist the Commission in the promotion of facilities-based competition.[61]

VIII. Neither The MDU Owner Nor The New Competing Video Provider Should Be Allowed To Act As An MDU Resident's Agent.

The Commission should not allow either the MDU owner or the competing MVPD to act as the agent of the MDU resident, unless the incumbent MVPD has expressly agreed to such an arrangement. The comments demonstrate that it is not uncommon, in both buildings that permit unit-by-unit competition and buildings that are located in right of access states, for MDU owners or competing MVPDs to act as agents for MDU residents switching their service to another MVPD. Such switches cannot only be aggravating for consumers, they often result in substantial equipment damage and other losses for MVPDs.[62]

If the Commission insists on allowing this behavior, it must adopt basic protections for both consumers and incumbent MVPDs. In order to remedy abuses, there should be an affirmative obligation on the part of the agent to inform the incumbent MVPD prior to the switch so as to allow the incumbent to remove and retrieve its equipment beforehand. If an agent fails to comply with this requirement, the agent should be fully responsible for the full value of the equipment to the extent it is damaged or not returned. Moreover, where an incumbent MVPD is not immediately informed of a subscriber's switch to a new service provider by the subscriber's agent, the agent should be fully responsible for any accrued

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[61]The allegations in footnote 21 of RCN's comments regarding Time Warner litigation involving existing wiring in MDU molding and conduit is factually inaccurate and misleading. In order not to cloud these reply comments, but to ensure the accuracy of the record as to the actual specifics of the cases cited by RCN, Time Warner attaches, as Exhibit A hereto, its response to RCN's footnote 21.

[62]See TCI Comments at 22-24; Time Warner Comments at 45-47.

monthly service charges between the time the subscriber's service was terminated, and the time that the agent notifies the former provider of the switch. Such requirements are simple, effective, pro-consumer protections against blatant abuse of power.

The record also demonstrates that where MDU owners or competing MVPDs act as agents for MDU residents, it is not uncommon for MDU residents' existing video service provider to be switched to a new provider without their affirmative consent (commonly referred to as "slamming").[63] Any potential benefit to competition from allowing unauthorized switches is strongly outweighed by the Commission's stated interest in promoting MDU residents' ability to select their own video service provider. Such behavior is contrary to the stated public policy goal of promoting consumer choice, and should not in any manner be sanctioned by the Commission's inside wiring rules as they now exist or may be revised. An MDU owner or new video service provider should be allowed to act as an agent for an MDU resident only with the written authorization of that resident and, as it is in the long-distance context, unauthorized switches should lead to sanctions against the offending party.

Remarkably, OpTel suggests that, unlike with slamming in the long distance telephone service context, slamming in the video service context is less egregious because the "service provided by MVPD's is not transparent to the subscriber".[64] Such a self-serving argument, that MDU residents are not harmed by video slamming because they will quickly know when they have been switched, makes slamming no less valid from a public policy perspective; it just makes it moderately easier for an MDU resident to recognize the injustice caused.

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[63]Id.

[64]OpTel Comments at 5.

Furthermore, it is not the case in the MDU video service context, as it is in the long distance telephone context, that a subscriber can easily remedy "being slammed" by instantly switching back to its former service provider with a single telephone call. Indeed, a switch-back is not, as OpTel smugly characterizes, a slight inconvenience for an MDU owner. As demonstrated by the egregious situation presented in Time Warner's Comments, such a switchback cannot be completed instantaneously and is often terribly aggravating to an affected customer.[65] Furthermore, slamming often results in permanent harm to incumbent MVPDs which undeservedly lose customers who would be too inconvenienced, or who lack the knowledge of their right to switch back to their old provider.

IX. Rather Than Vesting In The MDU Owner Upon Installation, Disposition Of MDU Home Run Wiring Is Best Left To Private Negotiations.

The Further Notice asks "whether we should adopt a rule requiring video service providers to transfer to the MDU owner upon installation ownership of the home wiring and home run wiring installed in MDUs under contracts entered into on or after the effective date of any rules we may adopt."[66] Contrary to the assertions of OpTel that such a proposal is somehow pro-MDU resident,[67] such a result would only enhance the bottleneck leverage of landlords who would then have no incentive to pay fair market value for wiring if they know they can claim ownership immediately upon installation even if they refuse to pay. Indeed, RCN acknowledges as much.[68] Furthermore, as recognized by Heartland, if such a rule is

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[65]See Time Warner Comments at 46 & Exhibit A.

[66]Further Notice at ¶ 85.

[67]OpTel Comments at 5-6.

[68]See RCN Comments at 15.

adopted, new service providers would have little incentive to install facilities with no guarantee of compensation, thereby impairing "the development of free and effective competition in the video service marketplace."[69]

Furthermore, as recognized by GTE, the Commission does not have the jurisdiction to adopt such a rule:

> The Communications Act does not authorize the FCC to regulate the private agreements between a competitive MVPD and an MDU building owner regarding the ownership rights in cable wiring. Any attempt to regulate such agreements between landowners and alternative service providers would be inconsistent with Commission and judicial precedent on the scope of the FCC's authority.[70]

Time Warner agrees, and further asserts that for the same reasons cited by GTE, the Commission does not have the authority or jurisdiction to mandate ownership rights in new cable wiring installed by any MVPD.

The Commission should instead leave resolution of such issues to private negotiations. Where MDU owners desire to own and control broadband distribution facilities in their buildings, they can hire contractors to install such facilities just as is done with regard to plumbing, HVAC, electricity, and other systems in MDU buildings. At most, the Commission should simply require that all future video service contracts between MDU owners and MVPDs contain provisions that clearly address ownership and disposition of wiring upon termination of the contract. This simple step would eliminate future confusion, as well as the need for a structurally rigid procedural mechanism such as that proposed in the Further Notice. Adoption of this straightforward requirement will clarify and resolve on a

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[69]See Heartland Comments at 7.

[70]GTE Comments at 18.

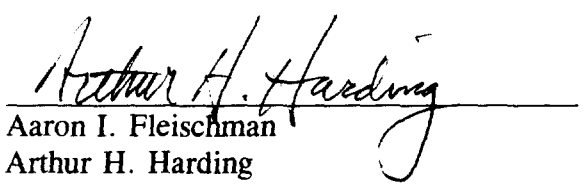
going forward basis issues related to the ownership and disposition of home run wiring, and eliminate the need for an overly complex procedural regime.

X. Conclusion.

For all the reasons set forth above, the Commission should not adopt the proposal put forth in the Further Notice as it currently exists. If any procedural rules affecting the disposition of home run wiring in MDUs are adopted, they should be clarified and refined in accordance with the initial and reply comments submitted by Time Warner Cable in this proceeding.

Respectfully submitted,

TIME WARNER CABLE

By: 

Aaron I. Fleischman
Arthur H. Harding
Jill Kleppe McClelland
Craig A. Gilley

FLEISCHMAN AND WALSH, L.L.P.
1400 Sixteenth Street, N.W.
Suite 600
Washington, D.C. 20036
202/939-7900

Its Attorneys

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57545.2

EXHIBIT A

Time Warner herein responds to the factually incomplete and misleading depictions of Time Warner litigation with MDU owners in New York City contained in footnote 21 of RCN's comments:

RCN's description of the settlement in Paragon Cable Manhattan v. P&S 95th Street Association and Milstein Properties Corp. is materially incomplete. In that case, there was a triable issue of fact as to who owned the subject cables which warranted settlement. RCN fails to note that the settlement required the MDU owner to pay Time Warner a sum of money which included half the amount Time Warner paid an electrical contractor to install cable in the building at the time the building was under construction. Furthermore, the home run cables in this case were installed in internal conduits, as to which Time Warner made no claim of ownership. This building, therefore, is atypical of other buildings in New York, in most of which cables are installed in accessible plastic moldings located in hallways.

In Time Warner Cable v. Board of Managers of the Dorchester Condominium, the Court previously issued a preliminary injunction preventing interference with Time Warner's cable facilities in violation of Public Service Law Section 228 and a contract between Dorchester and Time Warner. Time Warner has a motion for summary judgment pending. Because the preliminary injunction remains in effect, Time Warner has indicated to the Court (and Dorchester has agreed) that the Court, if it prefers to do so, may await action by the FCC in the instant proceeding before ruling on the summary judgment motion.

RCN has also mischaracterized the facts in 10 West 66th Street v. Manhattan Cable Television, Inc. Time Warner did not commence this action. Rather, a building under contract to Liberty Cable sought a preliminary injunction against Time Warner to prevent interference with a contemplated installation of service by Liberty Cable. The motion was frivolous, since Time Warner was in no way preventing Liberty Cable from installing its service. In opposing the MDU owner's motion, Time Warner requested that the Court impose sanctions on the plaintiff because of the complete baselessness of the claims. The MDU owner immediately thereupon withdrew its motion for preliminary injunction, and the case has remained inactive.

Finally, RCN has mischaracterized Manhattan Cable v. 35 Park Avenue Corp. In this case, Time Warner merely sought to enforce its right to install its own upgraded cable facilities in the building pursuant to applicable New York law. No issue was raised as to Liberty Cable's use or removal of cable from moldings or conduits. The case is simply another example of buildings under "exclusive" contract to an alternative MVPD attempting to prevent unit-by-unit competition from the franchised cable operator.